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NEWS

Exploring the Boundaries Of the Fifth Amendment

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The announcement by Michael Flynn, the former national security adviser, that he wouldn't respond to a subpoena from the Senate Intelligence Committee—requesting a list of contacts with Russian officials—had TV news producers (and members of Congress) scrambling to get Fifth Amendment experts on the line. But Flynn wasn't breaking new ground: Two years earlier, when former top aides to New Jersey Gov. Chris Christie refused to provide documents to a state investigative committee, they also cited their Fifth Amendment rights against self-incrimination. Their refusal was upheld in a 98-page opinion by a New Jersey Superior Court judge, who found that the subpoena unconstitutionally compelled testimonial evidence. In doing so, the judge relied on the "act of production" doctrine, which holds that regardless of content, the act of producing documents may itself have a testimonial, and thus incriminating, quality.

The "act of production" doctrine gestated in the 1970s, when the absolute protection traditionally afforded "private books and papers" gave way to a more nuanced evaluation of whether the act of selecting and producing material, regardless of its content, could be construed as "testimonial" in nature. The doctrine officially arrived with the U.S. Supreme Court's decision in *Fisher v. United States*, 425 U.S. 391 (1976), where the court explained that "an act is testimonial when the accused is forced to reveal his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the government." Still, the court declined to find Fifth Amendment protection for the tax preparation documents at issue in that case, in large part because their "existence, custody, and authenticity" were a "foregone conclusion."

Three decades later, in *United States v. Hubbell*, 530 U.S. 27 (2000),

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the court reached the opposite conclusion. At issue in *Hubbell* was a grand jury subpoena directed to a defendant prosecuted in the wake of the Whitewater scandal. The court held that compiling documents in response to the broadly worded subpoena was no "mere physical act," as the government argued.

Instead: "The assembly of literally hundreds of pages of material ... is the functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery deposition." Unlike in *Fisher*, when the government knew what it was requesting (draft tax returns), who had them (attorneys), and how to authenticate them (accountants), the court held "here the government has not shown that it had any prior knowledge of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by respondent." This was determinative. As Justice John Paul Stevens wrote for the court, creating an oft-cited analogy, "It was unquestionably necessary for respondent to make extensive use of 'the contents of his own mind' in identifying the hundreds of documents responsive to the requests in the subpoena. ... The assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox."

After *Hubbell*, to determine the applicability of the doctrine, two critical inquiries emerge: First, what quantum of mental energy is necessary for the recipient of a subpoena to properly respond to the subpoena? Second, what prior, independent knowledge of the documents does the requestor have—given that, in the words of *Fisher*, simply conceding that something exists "adds little or nothing to the sum total of the government's knowledge"? The more specific the request, and the more unthinking the response, the less likely a person will be able to successfully invoke his Fifth Amendment rights. Or, as the U.S. Court of Appeals for the D.C. Circuit summarized, where "the subpoena was more a question of 'surrender' than of 'testimony,' the court [has] held that 'no constitutional rights are touched,'" in *United States v. Ponds*, 454 F.3d 313, 319–20 (D.C. Cir. 2006) (citing *In re Harris*, 221 U.S. 274, 279 (1911)).

All of this changes in the corporate context, where the "collective entity doctrine" governs. Years in the making, the doctrine was enshrined in *Braswell v. United States*, 487 U.S. 99 (1988). In *Braswell*, the court rejected a Fifth Amendment objection to production of books and records by the president and sole shareholder of two active corporations. It held that because corporations and other collective entities have no Fifth Amendment privilege, a corporate custodian must produce records and documents that he holds in a representative capacity, "even though production of the papers might tend to incriminate [him] personally." However, "the act is deemed one of the corporation and not the individual," and thus cannot form the basis for future, individual prosecution.

Hubbell did not disturb this rule: Again and again, federal courts have found that "the act-of-production doctrine is not an exception to the collective-entity doctrine even when the corporate custodian is the corporation's sole shareholder, officer and employee," as in *Amato v. United States*, 450 F.3d 46, 50-53 (1st Cir. 2006). In other words, corporate officers cannot rely on the Fifth Amendment to avoid production of corporate documents. (Though, as U.S. District Judge Laura Taylor Swain of the Southern District of New York held recently in *In re Cinque Terre Financial Group*, No. 16 CV 4774-LTS, at *4 (S.D.N.Y. Nov. 28, 2016), that calculus may shift upon an employee's resignation, and a former employee in possession of corporate documents may regain his right to invoke the privilege.)

Boundaries between the corporate and the personal blur—and the two lines of Fifth Amendment jurisprudence collide—with the advent of modern "books and papers" such as the iPhone calendar and work laptop. Increasingly, courts are grappling with whether being required to disclose one's computer password, or allow the decryption of one's hard drive, is sufficiently testimonial to trigger the "act of production" defense. In the personal realm, many courts have found divulging a computer or phone password to be barred by the privilege against self-incrimination. Meanwhile, both the Eleventh and Third circuits have agreed that a subpoena to decrypt

an individual's hard drive takes aim at a presumptively testimonial act, though they diverged on whether the request at issue was a "foregone conclusion" in the context of each case. Compare *United States v. Apple MacPro Computer*, 851 F.3d 238, 247–48 (3d Cir. 2017) (finding that "the government has provided evidence to show both that files exist on the encrypted portions of the devices and that Doe can access them") with *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1337 (11th Cir. 2012) (holding that "the government did not show whether any files existed on the hard drives and could not show with any reasonable particularity that the suspect could access the encrypted portions of the drives").

Given this context, *Braswell* and *Hubbell* may find themselves in a tug-of-war when a corporate representative is subpoenaed for technological records requiring a personal touch. The Eastern District of Pennsylvania confronted this issue recently in considering an SEC subpoena for passwords to bank employees' work phones. The two sides differed on the focus of the inquiry: Was it a question of the documents allegedly contained on the work phones, which were likely to be corporate records under *Braswell*? Or was it a matter of the employees' personal passwords, "which require intrusion into the knowledge of defendants and no one else"? Noting a lack of evidence that the employer bank assigned passcodes or even kept track of them, the court erred on the side of "personal." It held: "Absent waiver of the confidentiality attendant to this personal thought process, we cannot find the personal passcodes to the bank's smartphones to be corporate records falling under the collective entity cases. We find defendants' confidential passcodes are personal in nature and Defendants may properly invoke the Fifth Amendment privilege to avoid production of the passcodes," in *Securities and Exchange Commission v. Huang*, No. CV 15-269, at *2–3 (E.D. Pa. Sept. 23, 2015).

As we noted in our last article, "Fourth Amendment Exception Allows Customs to Search Personal Devices" (Martini and Glasser, 2017), "every major advancement in technology calls for a new balancing of security and privacy interests." The Fifth Amendment is no exception. As courts explore whether providing a password or decrypting a computer requires a window into thought processes more akin to "testimony" than "surrender," they are redefining the boundaries of the privilege against self-incrimination (and consequent requirements for use and derivative immunity). When the device at issue is the property of an employer, the question becomes whether the corporate overwhelms the personal, or vice versa.

These cases suggest that resisting a document subpoena on Fifth Amendment grounds may rely, at least in part, on how the request for information is framed. In Flynn's case, for example, it is interesting to consider whether the calculus shifts if the Senate's subpoena were directed at his phone records for specific dates, or an Outlook calendar for the Flynn Intel Group, rather than a personally crafted list of meetings. In fact, the Senate Intelligence Committee has reportedly also issued subpoenas to corporate entities under Flynn's sole control. It will be interesting to see how these subpoenas fare. In Flynn's case and others, it seems the precise contours of the request matters, and smart lawyering on both sides may make all the difference to the successful invocation of the privilege. ■